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IN THE

Supreme Court of the United States

October Term, 1959

No. 245

AFFILIATED MUSIC ENTERPRISES, INC.,
Petitioner,

against

SESAC, INC.,
Respondent.

BRIEF OF RESPONDENT, SESAC, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Preliminary Statement

The Petitioner seeks a Writ of Certiorari addressed to the United States Court of Appeals for the Second Circuit to the end that the unanimous affirmance by that Court of the judgment of the United States District Court for the Southern District of New York dismissing Petitioner's complaint on the merits may be reviewed here.

The case was tried before the District Court (Ryan, J.) for ten days. The trial ended on March 15, 1957. Subsequently, exhaustive briefs were submitted to the

Court by both sides. Thereafter the District Court on January 30, 1959 filed an opinion dismissing the complaint with costs and also respondent's counterclaim. Petitioner and Respondent appealed from the judgments to the United States Court of Appeals for the Second Circuit which affirmed the judgments with a decision written by Chief Judge Clark on June 8, 1959, a copy of which is appended to the Petition filed herein. No petition for a rehearing was filed by either party. Respondent has not and does not intend to file a petition for a Writ of Certiorari.

Petitioner claims as reasons for granting the Writ that there is a conflict between the decisions of the Court of Appeals and the applicable decisions of this Court on questions relating to private enforcement of the anti-trust laws. It further claims that the Court of Appeals has so far departed and has permitted the District Court to so far depart from the accepted and usual course of judicial construction of the anti-trust laws as to call for an exercise of this Court's power of supervision.

As explained below, there is no merit in such contentions. None of the reasons set forth in Supreme Court Rule 19 is present in this case. The sole question presented to this Court is whether Petitioner sustained the burden of showing as a matter of fact that it "was injured in his business or property by reason of anything forbidden by the anti-trust laws. . . .". (15 U. S. C. Sec. 4) The District Court ruled on the facts that Petitioner did not meet this burden, and the Court of Appeals affirmed this ruling on the facts.

Thus, the United States District Court for the Southern District and the United States Court of Ap-

peals for the Second Circuit after an exhaustive review of the facts held that there was a complete absence of any showing that Petitioner was injured in its business by anything forbidden by the anti-trust laws. The Supreme Court of the United States has now been asked to be the third court to pass on that factual question.

The petition falls squarely within the frequently announced rule of this Court that "granting of the Writ would not be warranted merely to review the evidence or inferences drawn from it". *General Talking Pictures Company* v. *Electric Company* (1937) 304 U. S. 175 at page 178; *Southern Power Company* v. *N. C. Public Service Company* (1923) 263 U. S. 508.

Statement of the Case and Argument

The Petitioner, Affiliated Music Enterprises, Inc. (AME) charged the Respondent, Sesac, Inc. with violations of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act, 15 U. S. C. A. §§ 1, 2 and 14.

As the District Court found and the Court of Appeals affirmed, Respondent Sesac is a family corporation owned and controlled by Paul and Ruth Heinecke (19a, p. 17).* It is one of three major licensing organizations for music performance rights in this country. The others, each larger than Sesac, are the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music Incorporated (BMI) (14a, p. 19).

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* The "a" references are to the Joint Appendix.

The "p" references are to the pages of the Opinion of the Court of Appeals annexed to the Petition.

These companies acquire exclusive performance rights to copyrighted music from owners of copyrights, police infringements of these rights, and license others to perform the music. In the case of Respondent Sesac, at least, these licenses are sold principally to radio and television broadcasters; and it generally offers them only blanket or conglomerate licenses authorizing the performance of all works it controls. The copyright owners are paid royalties out of these licensing proceeds computed on a rather complex allocation system (14-18a, p. 18).

Petitioner AME was organized in 1953; it sought to enter the performing rights field by acquiring rights which it intended to exploit not by direct licensing to users as do Respondent Sesac and ASCAP and BMI, but by exclusive licensing to one of these three organizations. Half its stock is owned by Jean and Julian Aberbach and the remainder by Kurt A. Jadassohn. The Aberbach brothers are the owners of Hill & Range Songs, Inc., a large music publisher; and Jadassohn is a former officer of Respondent Sesac (19-22a, p. 18).

Petitioner AME, as the District Court found (which finding was affirmed by the Court of Appeals (p. 19)), was the creature of BMI, one of Respondent's two competitors. BMI used Petitioner in its attempt to take over the "gospel music" publishers affiliated with Respondent (21-22a, 31-33a).

While with Respondent Sesac, Jadassohn initiated an extensive campaign of acquiring performance rights to "gospel music" (19a, pp. 18-19). This is a type of music which is popular in the South and in rural areas throughout the country. It is characterized by lyrics dealing with spiritual and religious subjects in a per-

sonal, homely vein sung to distinctly secular rhythms and tunes. By 1953, Respondent Sesac held rights of more than a score of gospel music publishers under contracts terminable at ten-year intervals. Many of these publishers had personally dealt only with Jadassohn in their business relations with Respondent Sesac (12-14a, 19a, p. 18).

The only rights Jadassohn sought to acquire for Petitioner AME under his agreement with the Aberbachs were those of publishers affiliated with Respondent Sesac. Specifically, in late August and September of 1954, he attempted by canvassing each of them to acquire for Petitioner AME the performance rights to the music of 17 of Respondent Sesac's affiliated publishers who specialized in "gospel music." As a result of Jadassohn's promises to increase their royalties and various false representations made by him about Sesac's financial condition, he succeeded in acquiring blanket assignments of performing rights from fifteen of the seventeen publishers he solicited. In fact, as the Court found, the publishers would soon have received increased royalties in any event, since, as Jadassohn knew, Sesac had just negotiated a license agreement with the television industry, which had theretofore been carried along gratis by all three performing rights organizations (22-26a, p. 18; 143a, 259a, 435a, 441a, 442a, 452a, 453a, 459a, 492a, 497a, 508a). When word reached defendant of Petitioner's activities, it, too, sent representatives into the field. Ultimately, after a meeting between representatives and attorneys for the publishers, Jadassohn and a Sesac representative, all but one of the fifteen who had signed with AME elected on the advice of their own attorney and without any pressure or coercion by Re-

spondent Sesac to cancel those contracts and remain with Sesac (25-26a, p. 18; 179a, 323-27a, 351-55a, 364-65a, 415a, 419a, 425-6a, 428-30a, 438a, 441a, 454a, 459a, 460a, 505a, 549a, 564a).

As the District Court found (30a), the facts proved, far from supporting Petitioner's contention that its loss of such contracts resulted from Respondent Sesac's alleged anti-trust violations, showed rather that Respondent Sesac was the winner in a competitive battle between it and its competitor BMI which prevented the latter from taking its "gospel music" publishers from it.

It was not a mistaken view of the law or a misapplication thereof on the part of the District Court or the Court of Appeals which led to the rejection of Petitioner's claim that Respondent was guilty of a violation of Section 2 of the Sherman Act. It was the proven facts which led the District Court to find that Sesac did not monopolize the market in gospel music, did not drive Petitioner out of the industry, and could not and did not exclude competition or control prices therein. As the Court of Appeals in affirming these findings said at pages 19-21:

> "Far from showing a restraint of trade or a monopolization, however, the evidence adduced below reveals only a noteworthy competitive struggle between two giants in the performing rights industry. Judge Ryan found that AME was but the alter ego of the Aberbach brothers' substantial publishing house Hill & Range Songs, Inc.; which was in turn closely affiliated with BMI. This finding is amply supported by the evidence. AME was financed wholly by loans from Hill & Range and had only $100 of paid-in

capital, while its office was a desk in the Hill & Range office. While soliciting performance rights for AME, Jadassohn also signed up publication rights for Hill & Range. Moreover, under the Hill & Range-BMI contract in force from 1949 to 1955, Hill & Range and the Aberbachs personally covenanted that all performance rights they might acquire would be assigned to BMI unless previously assigned to another performing rights organization. And BMI itself has financed this litigation.

"Against this background of fierce competition between BMI and Sesac, AME's charges of antitrust violations must fall of their own weight. There is a complete absence of any showing that Sesac has that power over price or to exclude a competitor which is the essence of the violations charged. . . . The temporary success of AME's raid on Sesac's publishers suggests that these publishers do not feel closely tied to defendant on a permanent basis; and Sesac's ultimate thwarting of AME's efforts was accomplished not by the force of its existing contracts or by economic coercion, but by fair and open salesmanship and an outbidding of plaintiff's offers to the publishers.

"It is significant that AME was able to retain the largest of the publishers it initially signed up, despite the power it asserts defendant has; and it retained this publisher simply by offering it favorable terms, including a guarantee of the AME contract by the financially sound Hill & Range Songs, Inc., which it did not make available to the smaller firms.

"The record below similarly lacks evidence even as to Sesac's position in the market that it is alleged to have monopolized. Judge Ryan's findings do seem to support the conclusion that per-

formance rights in gospel music constitute the relevant market for purposes of this case. Thus he found the music distinct from other popular music, and without substitutes which will equally satisfy its devotees. But the popularity of the typical gospel tune is quite shortlived, and its performance rights of value only for a small portion of the copyright term. There is no evidence of the proportion of currently valuable performance rights Sesac owned at any time relevant to this litigation."

So too the District Court found to be without merit Petitioner's charge that it suffered injury, because Sesac's pooling of its performance rights and alleged practices of granting broadcasters only conglomerate licenses covering all rights it owns allegedly violated Section 1 of the Sherman Act and Section 3 of the Clayton Act (31a).

As the District Court found (20-22a), which finding was affirmed by the Court of Appeals (p. 19), the Petitioner AME was organized for the purpose of securing for Respondent Sesac's competitor BMI the gospel music publishers affiliated with Sesac. The District Court said that "it would be naive to assume that any organization other than BMI would eventually succeed to defendant's (Respondent Sesac) assigned performance rights" (32a).

The District Court so concluded because the evidence shows and the Court so found that far from attempting to rescue the publishers, Petitioner was seeking to profit from their affiliation with Respondent Sesac until such time as Respondent Sesac could be replaced by its competitor BMI (21a, 23a, 99a, 150a, 167a, 295a,

632a). As the Court said, this was "A perfect situation of a plaintiff 'blowing hot or cold with illegality' " (32a). It further held that Petitioner AME's "theory is a blanket confession that but for Defendant's alleged stranglehold on the gospel music market it believes that it" (and eventually BMI) "would have succeeded in supplanting Defendant as a monopolist", and that to permit Petitioner to recover against Sesac "would be to have this Court place 'its imprimatur on a scheme which involves * * * a violation of the antitrust laws' " (31-33a).

The Court of Appeals in affirming the District Court finding that Petitioner was not injured by Sesac's alleged *per se* violation of the Sherman and Clayton Acts, found that such alleged violations in any event were entirely irrelevant to this litigation saying at page 21:

> "* * * Sesac's pooling of the performance rights assigned to it and its offering to broadcasters of only conglomerate licenses authorizing the performance of all works it controls, which AME attacks as *per se* violations of the Sherman and Clayton Acts, have, we feel, no relevance at all to this litigation. As Sesac's pool of performance rights includes all its acquisitions, of which rights to gospel music comprise only a small portion of the total, these practices do not by themselves tend to prove that Sesac has monopoly power in the field of gospel music. And AME has not suggested any manner in which they operated to its injury or otherwise restrained its competition with Sesac. Clearly they played no part in Sesac's successful winning back of the fourteen publishers AME temporarily acquired. AME's own proposal to the publishers was that it would affiliate them with

the even bigger performance-rights pools of ASCAP or BMI. So far as we can see, they present no present hindrance to the acquisition or marketing of performance rights by AME."

CONCLUSION

Neither the District Court nor the Court of Appeals misapprehended the applicable law, nor is the decision of the Court of Appeals in conflict with it. The District Court dismissed the Petitioner's complaint on the merits, and the Court of Appeals affirmed such dismissal for the reason that Petitioner failed to prove that it suffered any injury as a result of a violation by the Respondent of any of the provisions of the Sherman or the Clayton Act.

Accordingly, it is respectfully submitted that the petition be denied.

Respectfully submitted,

THOMAS F. DALY,
Attorney for Respondent.